Petition

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No. 81-830

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

PETER McCANN GIESEY,

PETITIONER

v.

DONALD J. DEVINE, DIRECTOR,
OFFICE OF PERSONNEL
MANAGEMENT

AND

MARVIN H. MORSE, DIRECTOR,
OFFICE OF ADMINISTRATIVE
LAW JUDGES

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in affirming the district court's holding that petitioner, an Adminstrative Law Judge, must exhaust non-efficacious administrative remedies that cannot cure continuing violations of statute and regulation specifically intended to guarantee decisional independence of Administrative Law Judges so as to assure litigants due process.

2. Whether the court of appeals erred by not granting summary judgment for petitioner when the undisputed facts established plain violations of statute and regulation.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term 1981

No. 81-830

PETER McCANN GIESEY,

Petitioner

v.

DONALD J. DEVINE, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT

and

MARVIN H. MORSE, DIRECTOR,
OFFICE OF ADMINISTRATIVE LAW JUDGES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Justices of the Supreme Court of the United States:

Peter McCann Giesey, by counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the

District of Columbia Circuit in case no. 80-2100, affirming the judgment of the United States District Court for the District of Columbia dismissing his complaint.

OPINIONS BELOW

The opinion of the district court (2a)[1/] is not officially reported.

The per curiam judgment of the court of appeals (7a) is not officially reported.

JURISDICTION

The district court's judgment was entered September 10, 1980. The judgment of the court of appeals was entered June 5, 1981. A timely filed petition for rehearing was denied by the court of appeals August 4, 1981. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) and 2101(c).

1/ References are to the Appendix.

STATUTES AND REGULATIONS INVOLVED

5 U.S.C. 1103(b)(1), 1205(a), 1205(e)(1)(B) and (2), 2302(b), 4301(2)(D), 4302(a), 5372, 5 CFR 430.203(i)(2), 771.202, 771.205, 771.206(c)(i) and (ii), 771.303(c), 771.304, and 930.211 are reproduced in the Appendix.

STATEMENT OF THE CASE

Petitioner is a GS-15 Administrative Law Judge ("ALJ") employed by the United States Department of Labor. After learning that the Office of Administrative Law Judges ("OALJ"), pursuant to policy established by the Director of the Office of Personnel Management ("OPM"), requests a performance evaluation from "supervisory" ALJs when a GS-15 ALJ seeks to advance within the ALJ career field by seeking certification to the GS-16 ALJ Registers, petitioner filed a complaint with the Special Counsel of the Merit

Systems Protection Board ("MSPB"). Relying on specific statutory and regulatory provisions which proscribe performance ratings of ALJs by their employing agency, petitioner alleged that the policy just described violates statute and regulation because the "supervisory" ALJs serve in that capacity at the pleasure of the agency that employs them.[2/] Petitioner contended that seeking a performance evaluation from one who serves at the pleasure of the employing agency constitutes seeking such evaluation from the agency. The Special Counsel declined action on petitioner's complaint on the ground that:

> The Civil Service Reform Act of 1978 (Public Law 95-454) authorizes this Office to investigate certain prohibited personnel practices and to require an investigation and a report from agencies into allegations of mismanagement, a gross waste of funds, an abuse

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2/See p. 13 n. 5, infra.

> of authority, or a substantial and specific danger to public health or safety. Upon review of the information which you have submitted, we have concluded that there are insufficient facts to reasonably conclude that a prohibited personnel practice has occurred in the factual circumstances which you described. Further it does not appear to be the type of information which should be forwarded to the head of an agency for an investigation and a report under the "whistleblower" provisions of the Act. Thus, we anticipate taking no further action with respect to your allegations.

Having exhausted the only possible administrative remedy to treat with his complaint, petitioner instituted this action in the United States District Court for the District of Columbia, naming as defendants the Director of OPM and the Director of OALJ, a part of OPM. Petitioner sought declaratory and injunctive relief on behalf of himself and "all GS-15 ALJs employed by agencies of the United States." Jurisdiction of the

district court was invoked pursuant to 28 U.S.C. 1331(a), 2201, and 1391(e).

The complaint based petitioner's standing and the ripeness of the controversy solely on the fact that petitioner is a GS-15 ALJ. It relied on the following substantially undisputed facts to support the contention that the practice of seeking performance evaluations from "supervisory" ALJs violates specific statutory and regulatory provisions prohibiting an ALJ's employing agency from rating his performance.

Currently, there are two grades of ALJs - GS-15 and GS-16. All ALJs - whether GS-15 or GS-16 - statutorily are guaranteed independence in their decisional functions so as to ensure they act in their quasi-judicial capacities free from outside influence, including influence from their employing agencies.

Therefore, all ALJs are, inter alia, exempt from performance evaluations by their employing agencies. 5 U.S.C. 4301 (2)(D), 4302, 5372; 5 CFR 930.211. These proscriptions notwithstanding, when a GS-15 ALJ seeks certification of eligibility for the GS-16 ALJ Registers, OALJ sends performance evaluation forms called "vouchers" to, inter alia, ALJs who are employed by the applicant ALJ's employing agency, and who have been designated "supervisory" ALJs because they are assigned certain administrative functions.

The "voucher" from the "supervisory" ALJ, which may include the "supervisory" ALJ's consideration of the applicant ALJ's decisions, including consideration and evaluation of results reached, is given "controlling weight", and, in any event, affects the applicant ALJ's eligibility or rating. Rating (score), as well as eligibility, is critical in determining

appointment from the ALJ Registers. In their "supervisory" capacities, these ALJs serve at the pleasure of the head of the agency which employs the GS-15 ALJ with respect to whom the evaluative "voucher" is sought.

Since the "supervisory" ALJ serves in that capacity at the pleasure of the employing agency - at the pleasure of the agency head, a political appointee - petitioner contended that the evaluation is from the employing agency and therefore is proscribed. In other words, petitioner contended that because of the "voucher" from the supervisory ALJ, and especially because this voucher generally is given "controlling weight", the employing agency can interfere with decisional independence since it can, through the "supervisory" ALJ, substantially affect GS-15 ALJs' career advancement.

When this action was instituted, petitioner had applied for the GS-16 ALJ Registers.[3/] However, his application is neither the subject of, nor relevant to, this litigation. Petitioner's action is based solely on his status as a GS-15 ALJ.

3/The procedure for a GS-15 to be certified to the GS-16 Registers is as follows. First, an applicant is rated on experience. If experience is found acceptable, "vouchers" or rating forms are sent to persons OALJ believes are in a position to evaluate or rate the applicant's abilities. These include persons with whom the applicant has been associated in practice, former supervisors, opposing counsel, judges before whom the applicant has appeared, etc. The "vouchers" are then scored on a subjective basis. Some are subjectively called "controlling" and are assigned greater weight. If the applicant achieves a sufficient score on the "vouchers", he then takes a written examination and is interviewed orally. Finally, the applicant is assigned a final score or rating and is placed on the Registers from which selections are made by agencies of the United States. Ordinarily, an employing agency must select from among the three top-rated applicants. Therefore, score or numerical rating is critical in determining which applicants certified to the Registers in fact will be offered employment or promotion.

While this action was pending, petitioner was found ineligible for the GS-16 Registers. He appealed that rating to the Administrative Law Judge Rating Appeals Panel ("ALJRAP"). That appeal was dismissed at petitioner's request. Petitioner never has sought judicial review of his rating in the ALJ examination; no such review is sought here.

The court of appeals, per curiam, and without opinion (Rule 13(c), Rules of the United States Court of Appeals for the District of Columbia Circuit), affirmed the district court's order dismissing petitioner's action for failure to exhaust administrative remedies.4/ Three grounds were given for the decision.

4/Neither court ruled on petitioner's cross-motion for summary judgment, based on undisputed stipulated facts, or on petitioner's motion for class action certification.

First, in the apparent belief that petitioner was seeking review of OALJ's finding of his ineligibility for the GS-16 ALJ Registers, the court of appeals affirmed the district court's holding that petitioner must exhaust his appeal of rating before the ALJRAP prior to seeking judicial relief. The court entirely overlooks that petitioner's action is directed solely at protecting ALJ decisional independence and that he is not seeking any review of OALJ's finding of his ineligibility for the GS-16 ALJ Registers. The ALJRAP simply is a rating review board. It has no power to alter OPM or OALJ policy. Nor can it grant declaratory, injunctive, or class relief.

Second, despite the fact that the policy challenged is not a rule issued by the Director of OPM pursuant to APA rule making procedures, the court of appeals held that 5 U.S.C. 1205(a) and

1205(e)(1)(B) and (e,(2) mandate that petitioner should have petitioned the MSPB to review the policy he challenges. The cited statutory provisions provide that under certain well defined circumstances the MSPB may, in its discretion, review some rules and regulations issued by the Director of OPM pursuant to APA rule making procedures. The court neither discussed these new and complex provisions of the Civil Service Reform Act of 1978 (Pub. L. 95-454, 92 Stat. 1111) nor gave any reasons for its conclusion.

Finally, based on a chance remark by Government counsel at oral argument, the court of appeals stated that petitioner had an administrative remedy via the Government's internal grievance procedure. The grievance procedures were neither cited nor discussed by the court.

REASONS FOR GRANTING THE WRIT

A. The Exhaustion Question

1. The substance of this case presents an important issue that seriously affects statutorily mandated decisional independence of GS-15 ALJs. Interference with that independence necessarily creates serious questions of due process for litigants appearing before GS-15 ALJs.[5/] See, infra.

5/ Though they may not make headlines, decisions of administrative law judges affect the products we buy, the planes we fly, and the television we see. Any time the recipient of a Social Security check follows up on a formal complaint, it's heard by one of the 654 Administrative Law Judges who work for the Social Security Administration.

O'Toole, "Administrative Law Judge: Decisions Mean Dollars", Washington Post, No. 283, September 13, 1980, at p. A. 3, Col. 3. All ALJs at Social Security (except the Chief ALJ) are GS-15 ALJs and are subject to the potentially corruptive procedure plaintiff contends is an illegal interference with decisional independence. See OPM Announcement 318, p. 18 (Oct.

The court of appeals, affirming the district court, did not reach the merits of petitioner's claim, concluding that petitioner failed to exhaust administrative remedies. The decision does not comport with principles stated by that court in League of United Latin American Citizens v. Hampton, 501 F.2d 843, 847 (CADC 1974), as well as by other circuits.[6/] It is inconsistent with the long settled rule that a remedy which cannot afford complete relief need not be exhausted before seeking redress in the courts. This Court recently applied that rule in Clayton v. Int'l. U. UAW, __ U.S.

5/(cont'd.) 1979). Other agencies with GS-15 ALJs are the Interstate Commerce Commission, the Department of Housing and Urban Development, the Department of Labor, the Department of Transportation, the Department of the Treasury, and the Environmental Protection Agency. Id.

6/See, e.g., Porter County Chap. Izaak Walton League v. Costle, 571 F.2d 359, 363 (7th Cir. 1978), cert. den., 439 U.S. 834; Barnes v. Chatterton, 515 F.2d 916, 920 (3rd Cir. 1975).

__, 101 S.Ct 2088 (1981). See also, Barrentine v. Arkansas-Best Freight System, Inc., __ U.S. __, 101 S.Ct. 1437 (1981).

The court of appeals in effect held that a violation of law may not be enjoined and that a plaintiff must pursue administrative remedies incapable of affording complete relief before invoking the courts' jurisdiction. It thus has departed from the principles that resort to the courts will be denied a plaintiff until administrative remedies have been exhausted if, but only if, there are efficacious administrative remedies available, and that "the exhaustion requirement does not obtain when it is plain that any effort to meet it would come to no more than an exercise in futility." Lodge 1858, American Federation of Gov. Emp. v. Paine, 436 F.2d 882, 896 (CADC 1970). The court of

appeals:

a. Effectively rejected and created a conflict with the Second Circuit's holding in Nash v. Califano, 613 F.2d 10 (1980), that ALJs have standing to bring an action challenging practices that infringe on their decisional independence.

b. Without any reasoned consideration apparent on the face of the opinion, it has perfunctorily construed new and complex legislation (the Civil Service Reform Act of 1978, supra) creating the jurisdiction and powers of the MSPB, and indeed has construed those provisions in a manner contrary to their terms.

c. Based on a chance remark at oral argument by Government counsel, without citation of any authority, either by Government counsel or the court, it has misconstrued the Government's grievance system (see 5 CFR 771.201 - 771.304) by stating that the Government's internal grievance procedure is an administrative remedy petitioner could have pursued.

In short, for reasons stated more fully below, the decision simply does not accord with settled law. Totally apart from the underlying merit and importance of petitioner's claim, we respectfully

submit that the court of appeals' total departure from well-settled rules, by imposing on petitioner a requirement that he exhaust inadequate, futile, non-defined, nebulous, and non-existent administrative remedies before his claim may be considered by the courts is sufficient in and of itself to warrant review by this Court.

2. In order to understand fully the absence of an administrative remedy, it is necessary to explain the theory of petitioner's case on the merits. Accordingly, we here set forth summarily the violation of statute and regulation petitioner alleged. See also, infra.

Currently, there are two grades of ALJs -- GS-15 and GS-16. All ALJs -- whether GS-15 or GS-16 -- are statutorily guaranteed independence so as to ensure that they act in their quasi-judicial

capacities free from outside influence, including influence by their employing agencies. Therefore, all ALJs are, inter alia, exempt from performance evaluations by their employing agencies. 5 U.S.C. 4301(2)(D), 4302, 5372, 5 CFR 930.211.7/

Notwithstanding the cited statutory and regulatory prohibitions against performance evaluations of ALJs by their employing agencies, OALJ routinely sends "vouchers" or rating forms to "supervisory" ALJs, employed by the agency in which a GS-15 ALJ is employed, when the GS-15 ALJ seeks to advance within what

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7/5 U.S.C. 4301(2)(D) exempts ALJs from performance evaluations required by 5 U.S.C. 4302 for most other Government employees. 5 U.S.C. 5372 provides, in pertinent part, that ALJs "are entitled to pay prescribed by the Office of Personnel Management independent of agency recommendations or ratings." 5 CFR 930.211 provides that "[a]n agency shall not rate the performance of an administrative law judge." 5 U.S.C. 4302 and 5 CFR 430.203(i) (2) provide that performance evaluations are used, inter alia, for promotion decisions.

respondent Morse called the "administrative law judge career field", by seeking certification to the GS-16 Registers. "Supervisory" ALJs[8/] serve in their capacities at the pleasure of the agency in which they are employed. The evaluation they provide may include consideration of an ALJ's decisions, including evaluations of results reached in those decisions. Thus, respondents have engaged in and are engaging in a procedure to accomplish indirectly what cannot be done directly - agency performance evaluations of ALJs to help determine advancement within the "administrative law judge career field." In short, because of respondents' practice of vouchering "supervisory" ALJs, who

8/It is, of course, well settled that ALJs cannot be supervised in matters relating to their adjudicatory functions. Butz v. Economou, 438 U.S. 478, 514 (1978); Nash v. Califano, supra, 613 F. 2d 10, at 15; 43 Op. Atty. Gen. No. 9 (1977).

serve at the pleasure of the employing

agency, a GS-15 ALJ is exempt from performance evaluation by the agency employing him only so long as he does not seek promotion in "the administrative law judge career field."9/ See, infra, pp. 32-40.

3. Merely because a personnel practice is at issue does not convert this case into a challenge of a personnel

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9/We do not contend that ALJs are completely insulated from any conditions set on their employment by the hiring agency. Nor does our position deny the agencies the authority to appoint an ALJ to perform administrative tasks. Our position is only that when an agency appoints a "supervisory" ALJ to serve in that position at its pleasure, it cannot accomplish indirectly what it could not do directly - namely, give performance evaluations to GS-15 ALJs to affect promotion within "the administrative law judge career field." "Vouchers" properly may be requested from other sources (see p.9, n.3, supra). Such vouchers should form an ample basis on which to score an incumbent ALJ applicant, without attendant dangers intended to be averted by the proscriptions discussed above. Other procedures also could be utilized to form an adequate basis for determining eligibility, without compromising the independence of incumbent ALJs.

decision. What is challenged is the Government's violation of statute and regulation designed to protect the integrity of the administrative adjudicatory process. That protection was intended to be achieved by, inter alia, prohibition of certain personnel practices.

Petitioner's standing to bring this action rests solely on his status as a GS-15 ALJ. It is in that capacity that his decisional independence and the decisional independence of others similarly situated is being jeopardized. Thus, so long as petitioner, for promotion within the ALJ career field, is dependent on a proscribed evaluation by his employing agency, he is an aggrieved party with standing to maintain this action.

4. In effect, both the court of appeals and the district court have held that a practice alleged to be violative of

both statute and regulation may not be challenged as a proscribed infringement on ALJ decisional independence. The courts below have required that petitioner exhaust irrelevant administrative processes which cannot grant the relief sought and required to protect the decisional independence of GS-15 ALJs. Effectively, the courts below have rejected and created a conflict with the Second Circuits's decision in Nash v. Califano, supra, which holds squarely that ALJs have standing to challenge in the courts practices which infringe upon their decisional independence. 613 F. 2d at 16.

5. To be an efficacious administrative remedy, the remedy must be capable of affording the complaining party complete relief. If the administrative remedies cannot grant full relief, it is pointless to require they be exhausted

before resort to the courts may be had. See Clayton v. Int'l. U. UAW, supra, 101 S.Ct. at 2095-2099. Exhaustion should be required only "so long as resort to the agency is not obviously futile." League of United Latin American Citizens v. Hampton, supra, 501 F.2d at 847. See also, Lodge 1858, American Federation of Gov. Emp. v. Paine, supra, 436 F.2d at 896; Humana of South Carolina v. Califano, 590 F.2d 1070, 1081 (CADC 1978). We show below that none of the administrative remedies the court of appeals held petitioner must exhaust is efficacious.

6. As stated above, the court of appeals affirmed the district court's holding that petitioner must exhaust his appeal of rating before the ALJRAP prior to pursuing a judicial remedy. That holding rests on the erroneous assumption that petitioner's standing to bring this

action is bottomed on the pendency of an application for the GS-16 ALJ Registers. It also assumes, even were that remedy relevant, that the ALJRAP could afford complete relief to petitioner and to those similarly situated. Petitioner's application for the GS-16 ALJ Registers is totally irrelevant to this case. He is not seeking any review of OALJ's finding of his ineligibility.[10/]

Petitioner's standing and his cause of action are based on violations of statute and regulation that infringe upon his decisional independence in his present capacity as a GS-15 ALJ. See Nash v. Califano, supra. Petitioner is a GS-15 ALJ who may seek certification to the GS-16 ALJ Registers.[11/] If he does, his

10/Were petitioner seeking review of his rating by OALJ, the court of appeals decision would be correct.

11/To do so, petitioner must file a new application.

"supervisory" ALJ will be asked to evaluate his qualifications. Petitioner thus is subject, contrary to statute and regulation, to a proscribed evaluation by his employing agency. He is subject to proscribed practices infringing on decisional independence.

Moreover, even had petitioner pursued his appeal of rating with respect to his earlier application, that remedy does not qualify as an "efficacious administrative remedy." An efficacious administrative remedy is one capable of granting complete relief. Respondents do not dispute that the ALJRAP simply is a board that considers appeals of ratings on a case by case basis. It does not have authority to alter OPM and OALJ policies.

Even were the ALJRAP to have placed petitioner on the GS-16 Registers, violations of law would continue unabated. In addition, petitioner would

be competing on a tainted Register - tainted because many of the persons on the Register have had their qualifications evaluated by a statutorily and regulatorily proscribed procedure. Furthermore, assuming that the ALJRAP decision were "favorable" to petitioner - that he was found eligible for the GS-16 Registers - respondents presumably would argue that petitioner was not aggrieved and therefore that he could not seek judicial review of the ALJRAP's decision.[12/]

Respondents' position, adopted by the courts below, places petitioner and others similarily situated in a "Catch-22" situation. It would utilize slight of

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12/This logically follows from the Government's contention below that "[a]t least until the ALJ Rating Appeals Panel concludes action on plaintiff's administrative appeal, plaintiff's personal stake in this 'controversy' remains undeterminable" (Gov. Br. at 14).

hand applications of the exhaustion and standing doctrines to shield important issues from judicial review. It highlights the misperceptions under which both the district court and the court of appeals appear to have labored - namely, that petitioner has sought judicial review of OALJ's finding that petitioner is ineligible for the GS-16 Registers. As we repeatedly have emphasized, the fact that petitioner had applied for the GS-16 Registers is totally irrelevant to this litigation.

If petitioner had pursued his ALJRAP appeal to an unsuccessful conclusion, he could have sought judicial review of that determination.[13/] However, such review would involve only an individual determination of rating. Moreover, such a proceeding could not grant the relief

13/The MSPB does not have jurisdiction to hear appeals from the ALJRAP.

sought in the complaint or other appropriate relief.

In any event, whatever could be raised on review of the ALJRAP's decision is irrelevant because, as stated, supra, the ALJRAP admittedly does not have authority to grant full relief. It therefore is not a remedy that must be exhausted before judicial intervention is sought. See Clayton v. Int'l U. UAW, supra, 101 S.Ct. at 2095-2099; Barrentine v. Arkansas-Best Freight System, Inc., supra, 101 S.Ct. at 1447; League of United Latin American Citizens v. Hampton, supra, 501 F. 2d at 847; Barlow's, Inc., v. Usery, 424 F.Supp. 437, 439 (three-judge court) (D. Idaho 1976), affirmed, sub nom., Marshall v. Barlow's, Inc., 436 U.S. 307 (1978).

7. In our main brief below, we indicated that because the procedure challenged was a policy of general

applicability it might be challenged as a "rule" within the meaning of the APA. Respondents cited 5 U.S.C. 1205(a) and 1205 (e)(1)(B) and (e)(2), which provide, inter alia, that under well defined circumstances the MSPB may, in its discretion, review some rules and regulations issued by OPM pursuant to APA rule making procedures. The provisions are part of the Civil Service Reform Act of 1978, supra.

Without any discussion, the court of appeals concluded that there was MSPB jurisdiction. As stated above, petitioner complied with applicable regulations and filed a complaint with the MSPB's Special Counsel. The Special Counsel elected not to act. This exhausted petitioner's remedies with the MSPB.

The statutory sections cited by the respondents and the court of appeals

simply are inapplicable in this case. Those sections apply only to rules or regulations issued pursuant to 5 U.S.C. 1103. This policy was not issued pursuant to 1103, which requires that APA rule making procedures be followed. 5 U.S.C. 1103(b)(1). Furthermore, a rule can be declared invalid by the MSPB only if it violates 5 U.S.C. 2302(b) - the "Whistleblower" statute. There is no basis for a conclusion that this policy even arguably fits within 2302(b). See p. 5, supra.

Respondents made an ill conceived argument without any analysis of the statutory and regulatory provisions involved. Without any stated basis the court of appeals adopted their position. The court of appeals simply erred. 14/

14/The court of appeals cites 5 CFR 1201.1 - 1201.3, 1201.21 -1201.27. Those provisions simply are irrelevant.

Petitioner has exhausted all remedies with the MSPB.15/

8. At oral argument below, Government counsel remarked that petitioner might have filed a grievance. The court of appeals adopts that suggestion in its Judgment. We are at a loss to understand what kind of grievance petitioner might have filed.

5 CFR 771.201 - 777.304 provide for establishment of a grievance procedure by each agency for employees of that agency. Grievances are limited to the seeking of "Personal relief" (5 CFR 771.202). See also, 5 CFR 771.303 (c). What is at issue is a policy of OPM. It i s not subject to grievance procedures. 5 CFR 771.206(c) (i) and (ii). Moreover, as stated, supra, this is not a personal grievance. It is a challenge to policy. Furthermore, OPM has

15/As stated, supra, the MSPB has no jurisdiction to hear appeals from the ALJRAP.

no authority to review specific grievances. Its review is limited to a "from time to time" review of agency grievance procedures. 5 CFR 771.304.

B. The Merits

1. As noted, supra, p. 10, n.4, petitioner cross-moved for summary judgment. We respectfully submit that petitioner has, based on undisputed, stipulated facts, established a clear violation of law with respect to an issue of compelling importance (see, supra, and, infra), and that entry of summary judgment in these circumstances is appropriate. See, 6 Pt. 2, Moore, Federal Practice, §56.27 [2] at 56-1562.

At pp. 17-20, supra, we outlined the basis of petitioner's contentions with respect to the merits. Below, we amplify their basis.

2. Because the administrative process did not guarantee adjudication by

an impartial official of an agency, Congress enacted the Administrative Procedure Act providing adjudication by hearing officers insulated from outside influence. See Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128, 131 (1953); Butz v. Economou, 438 U.S. 478, 513-514 (1978); Nash v. Califano, supra, 613 F. 2d at 14-16. As stated in Amos Treat & Co. v. SEC, 336 F. 2d 260, 267 (CADC 1962):

> An administrative hearing ... must be attended not only with every element of fairness but with the very appearance of complete fairness. Only then can the tribunal conducting a quasi-adjudicatory proceeding meet the basic requirements of due process.

See also, Fitzgerald v. Hampton, 467 F. 2d 755, 768-769 (CADC 1972).

Accordingly, statutory and regulatory provisions were designed to protect the independence of the ALJ, "so as to assure that the hearing examiner exercises his

independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency." Butz v. Economou, supra, 438 U.S. at 513; Nash v. Califano, supra, 613 F. 2d at 15. Thus, "[t]he APA creates a comprehensive bulwark to protect ALJs from agency interference" so as "to maintain public confidence in the essential fairness of the [administrative adjudicatory] process." Nash v. Califano, supra, 613 F. 2d at 16. See Butz v. Economou, supra, 438 U.S. at 513-514.

> The [Administrative Procedure Act] provides that ALJs "are entitled to pay prescribed by the Office of Personnel Management independently of agency recommendations or ratings." 5 U.S.C. Section 5372. In addition Section 4301 and its implementing regulation (5 CFR Section 930.211) exempts ALJs from the performance ratings prescribed for other civil service employees. ALJ tenure, moreover, is specifically safeguarded by 5 U.S.C. Section 554, which

> provides that ALJs, unlike other civil servants, may not be removed without a formal adjudication.

Nash v. Califano, supra, 613 F. 2d at 15. See also S. Rep. No. 95-697, 95th Cong., 2d Sess. at 2, reprinted in [1978] U.S. Code Cong. & Admin. News 496, 497. 16/

As noted above, both statute and regulation prohibit a performance rating of an ALJ by the employing agency. 5 U.S.C. 4301(2)(D), 4302, 5372; 5 CFR 930.211. And it matters not whether that performance rating is for promotion or retention purposes. For,

> the hope of promotion may motivate men as strongly as the fear of loss of their jobs. If salaries and promotions are subject to agency

16/As stated, supra, ALJs have standing to protect their statutorily mandated independence. Nash v. Califano, supra, 613 F. 2d at 16. See also, generally, Duke Power Co. v. Carolina Env. Study-Group, 438 U.S. 59, 72 (1978), quoting Baker v. Carr, 369 U.S. 186, 204 (1962); United States v. SCRAP, 412 U.S. 669, 686 (1973); Gavett v. Alexander, 477 F. Supp. 1035, 1040-1041 (D.D.C. 1979), and cases therein cited.

> control, there is always danger that a subtle influence will be exerted upon the examiners to decide in accordance with agency wishes.

41 Op. Atty. Gen. 74, 78 (1951).

The performance rating or evaluation for promotion purposes has an especial potential for corruption because it impacts even more on ALJs than on the usual federal employee. Other federal employees who are denied a promotion in a particular agency can seek a position in their career field at a higher grade in another agency. Not so with GS-15 ALJs. In order to be promoted or to be hired at a higher grade by a different agency, they must be certified to the GS-16 Registers.[17/] Thus, the evaluation from the "supervisory" ALJ impacts not only within the agency in which the GS-15 ALJ is employed; it affects his advancement

17/The sole exception to this rule is when an ALJ position is reclassified to a higher grade by OPM. In that case the incumbent is "promoted" automatically.

absolutely. That voucher or evaluation, which is usually given "controlling weight", may be determinative not only of eligibility, but rating. Since rating is critical to actual selection from the Registers, the impact of the evaluative voucher from the "supervisory" ALJ is enormous.

Especially is this procedure violative of the APA since in making these evaluations, "supervisory" ALJs are free to evaluate decisions issued by GS-15 ALJs. That evaluation, of course, may include evaluations of results reached in those decisions.

"Supervisory" ALJs serve in their respective capacities at the pleasure of the agency, or, more accurately, at the pleasure of the agency head, who is a political appointee. It needs no argument to show that if an ALJ is dependent to any degree - whether for Register rating or

eligibility - upon the good offices of one who serves at the pleasure of the agency head, the ALJ can be controlled, subtly or otherwise, by the agency head through the "supervisory" ALJ. Such a "voucher" is in fact a performance evaluation by the agency. Its solicitation and use by respondents violates the spirit and the letter of the APA,[18] frustrates the will of Congress,

---

18/ It is, of course, well settled that "courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text as far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy." SEC v. C.M. Joiner Leasing Corporation, 320 U.S. 344, 350-351 (1943). Furthermore, courts "hesitate to sanction a result which thwarts established legislative purposes, or allows a skirting of the law merely on the basis of form." Greater Iowa Corporation v. McClendon, 378 F. 2d 783, 795-796 (8th Cir. 1967). Thus, a court "cannot, in the absence of an unmistakable directive, construe [statutes] in a manner which runs counter to the broad goals which Congress intended to effectuate." FTC v. Fred Meyer, Inc., 390 U.S. 341, 349 (1968).

and deprives litigants of the hearing without influence Congress intended to provide. See Amos Treat & Co. v. SEC, supra.[19/] It does not require a Ph.D. in logic to conclude that if A (agency) controls B ("supervisory" ALJ) and B has power to affect C's promotion (ALJ), A has power through B to control C.

Some "supervisory" ALJs are protected from loss of grade if they are relieved of their duties. However, that is irrelevant. Just as people may be controlled by economic factors, so also may they be influenced and controlled by potential loss of status for displeasing their supervisors. Thus, the comments solicited from "supervisory" ALJs are not comments from a member of the same statutorily exempt group. They are from

19/As stated, supra, the form, when filled out by the "supervisory" ALJ, may include his consideration and evaluation of an ALJ's decisions and the results reached in those decisions.

the agency. They are used to determine or affect advancement. They are proscribed performance evaluations by the employing agency.

Respectfully submitted,

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Attorneys for petitioner

APPENDIX

No opinion in the court of appeals.

Judgment reproduced at page 7a, infra.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PETER McCANN GIESEY, Plaintiff,	)	
v.	)	CIVIL ACTION
	)	No. 80-1494
ALAN K. CAMPBELL and MARVIN H. MORSE,	)	
Defendants.	)	

MEMORANDUM

This case arises under 5 U.S.C. §§ 4301, 4302 & 5372 (Supp. III 1979) and is before the Court on the defendants' motion to dismiss for lack of jurisdiction or for summary judgment. Because the plaintiff has failed to exhaust his administrative remedies, the Court grants the motion to dismiss.

Plaintiff is a GS-15 Administrative Law Judge (ALJ) at the United States Department of Labor who unsuccessfully applied for certification to the GS-16 ALJ

Registers. He here seeks to bring a class action on behalf of GS-15 ALJ's who have been denied eligibility for the GS-16 Registers. Plaintiff's theory is that the system of soliciting vouchers or favorable references from supervisors of GS-15 ALJ's applying for placement on the GS-16 Registers deprives the applicants of the independence mandated by the statute and regulations that, inter alia, preclude performance appraisals of ALJ's by their employing agencies.

It would be premature for the Court to reach the merits of plaintiff's case because it is evident that the plaintiff has failed to exhaust the administrative remedies established by the Office of Personnel Management (OPM) for unsuccessful ALJ applicants. In their pretrial submission of stipulated facts, both parties agree that plaintiff has an appeal outstanding with the Administrative

Law Judge Rating Appeals Panel. If the plaintiff is successful in his administrative appeal, his dispute will be moot. Like all others who seek to invoke the judicial process, this plaintiff must first exhaust available administrative remedies. E.g., Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938); Phillips v. Klassen, 502 F. 2d 362, 368 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974). Plaintiff's general allegation of futility does not obviate the need for exhaustion when it is readily apparent that the appeals panel may grant the relief requested or alter the issues to be presented to this Court. See League of United Latin American Citizens v. Hampton, 501 F. 2d 843, 845-47 (D.C. Cir. 1974). Exhaustion is also required before the plaintiff can maintain a class action. See Phillips v. Klassen, 502 F. 2d at 369.

For the reasons given, the Court dismisses this case without prejudice.

s/ Oliver J. Gasch
Judge

Date: 8 September 1980

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PETER McCANN GIESEY, Plaintiff,	)	
v.	)	CIVIL ACTION
	)	No. 80-1494
ALAN K. CAMPBELL and MARVIN H. MORSE, Defendants.	)	

ORDER

Upon consideration of defendants' motion to dismiss the complaint for lack of jurisdiction or for summary judgment, the memoranda submitted in support thereof and in opposion thereto, and the entire record herein, it is by the Court this 8th day of September, 1980,

ORDERED that defendants' motion to dismiss be, and hereby is, granted; and it is further

ORDERED that plaintiff's complaint be, and hereby is, dismissed without prejudice.

s/Oliver J. Gasch
Judge

[Entered September 10, 1980]

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

_____ [No opinion]

No. 80-2100 September Term, 1980

PETER McCANN GIESEY, Appellant

v. Civil Action No. 80-01494

DONALD J. DEVINE, in His Capacity as Director, Office of Personnel Management, et al.

Appeal from the United States District Court for the District of Columbia.

Before: WRIGHT, MacKINNON, and GINSBURG, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was briefed and argued by

counsel. The issues presented have been accorded full consideration by the court; they occasion no need for an opinion. See Local Rule 13(c).

This court is in agreement with the result reached by the District Court. Appellant seeks recourse to this court prematurely. He has an appeal pending before the Administrative Law Judge Rating Appeals Panel. In addition, we are advised by counsel for appellees that appellant may file a grievance with the Director of the Office of Personnel Management and that he may present his claims to the Merit Systems Protection Board. See 5 U.S.C. §§ 1205(a)(1), 1205(e)(1) & 2 (1976 & Supp. III 1979); 5 C.F.R. §§ 1201.1-1201.3, 1201.21-1201.27 (1980). After full opportunity for administrative consideration of the issues tendered in this acion, Giesey's claims

will be ripe for judicial review.

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam

For the Court

/s/
George A. Fisher
Clerk

[ENTERED June 5, 1981]

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 80-2100 September Term, 1980

Peter McCann Giesey,
Appellant Civil Action No.
80-1494

v.

Donald J. Devine, in his
capacity as Director,
Office of Personnel
Management, et al. ARGUED 5-21-71

BEFORE: Wright, MacKinnon and Ginsburg,
Circuit Judges

O R D E R

On consideration of appellant's petition for rehearing, filed July 28, 1981, it is

ORDERED by the Court that the aforesaid petition for rehearing is denied.

Per Curiam

FOR THE COURT:

George A. Fisher,
Clerk

BY:
Robert A. Bonner
Chief Deputy Clerk

[Filed August 4, 1981]

Statutes and Regulations

5 U.S.C. 1103(b)(1) provides:

(b)(1) The Director shall publish in the Federal Register general notice of any rule or regulation which is proposed by the Office and the application of which does not apply solely to the Office or its employees. Any such notice shall include the matter required under section 553(b)(1), (2), and (3) of this title.

5 U.S.C. 1205(a) provides:

(a) The Merit Systems Protection Board shall ---

(1) hear, adjudicate, or provide for the hearing or adjudication of all matters within the jurisdiction of the Board under this title, section 2023 of title 38, or any other law, rule, or regulation, and, subject to otherwise applicable provisions of law, take final action on any such matter;

(2) order any Federal agency or employee to comply with any order or decision issued by the Board under the authority granted under paragraph (1) of this subsection and enforce compliance with any such order;

(3) conduct, from time to time, special studies relating to the civil service and to other merit systems in the executive branch, and report to the President and to the Congress as to whether the public interests in a civil service free of prohibited personnel practices is being adequately protected; and

(4) review, as provided in subsection (e) of this section, rules and regulations of the Office of Personnel Management.

5 U.S.C. 1205(e)1(B) and (2) provide:

(e)(1) At any time after the effective date of any rule or regulation issued by the Director in carrying out functions under section 1103 of this title, the Board shall review any provision of such rule or regulation--

* * *

(B) On the granting by the Board, in its sole discretion, of any petition for such review filed with the Board by any interested person, after consideration of the petition by the Board; or

* * *

(2) In reviewing any provision of any rule or regulation pursuant to this subsection the Board shall declare such provision--

(A) invalid on its face, if the Board determines that such provision would, if implemented by any agency, on its face, require any employee to violate section 2302(b) of this title; or

(B) invalidly implemented by any agency, if the Board determines any personnal action taken by the agency or through any policy adopted by the agency in conformity with such

provision, has required any employee to violate section 2302(b) of this title.

5 U.S.C. 2302(b) provides:

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority--

(1) discriminate for or against any employee or applicant for employment--

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e--16);

(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

(C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));

(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

(2) solicit or consider any recommendation or statement, oral or

written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of--

(A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or

(B) an evaluation of the character, loyalty, or suitability of such individual;

(3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;

(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;

(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

(7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3110(a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110(a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official;

(8) take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for--

(A) a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences--

(i) a violation of any law, rule, or regulation, or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) a disclosure to the Special Counsel of the Merit Systems Protection Board, or to the Inspector General of an agency or another employee

designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences--

(i) a violation of any law, rule, or regulation, or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(9) take or fail to take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any appeal right granted by any law, rule, or regulation;

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States; or

(11) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

This subsection shall not be construed to authorize the withholding of information

from the Congress or the taking of any personnel action against an employee who discloses information to the Congress.

5 U.S.C. 4301 (2)(D) provides, in pertinent part:

> For purposes of this subchapter
>
> * * *
>
> (2) "employee" in or under an agency --- does not include
>
> (D) an administration law judge appointed under section 3105 of this title.

5 U.S.C. 4302(a) provides, in pertinent part:

> Each agency shall develop one or more performance appraisal systems which
>
> * * *
>
> (3) use the results of performance appraisals for --- promoting --- employees.

5 U.S.C. 5372 provides, in pertinent part:

> Administrative law judges appointed under section 3105 of this title are entitled to pay prescribed by the Office of Personnel Management independent of agency recommendations or ratings.

5 CFR 430.203(i)(2) provides:

(i) Performance appraisals shall be used:

(2) As a basis for decisions to grant awards; grant or withhold pay increases, i.e., within-grade increases, step increases, and quality step increases; grant merit pay; reassign; promote; train; retain in reduction in force; and reduce in grade or remove.

5 CFR 771.202 provides, in pertinent part:

"Grievance", except as provided in Secs. 771.206 of this part, means a request by an employee, or by a group of employees acting as individuals, for personal relief in a matter of concern or dissatisfaction relating to the employment of the employee(s) which is subject to the control of agency management.

5 CFR 771.205 provides:

Except as provided in §771.206(c), this part applies to any matter of concern or dissatisfaction relating to the employment of an employee which is subject to the control of agency management, including any matter on which an employee alleges that coercion, reprisal, or retaliation has been practiced against him or her.

5 CFR 771.206(c)(i) and (ii) provide:

(c) Matters excluded. (1) This part does not apply to:

(i) The content of published agency regulations and policy;

(ii) A decision which is appealable to the Merit Systems Protection Board or subject to final administrative review by the Office of Personnel Management or the Equal Employment Opportunity Commission under law or regulations of the Office or the Commission.

5 CFR 771.303(c) provides:

An employee in exercising the entitlement to present a grievance under this part shall:

* * *

(c) Specify the personal relief being requested.

5 CFR 771.304 provides:

The Office of Personnel Management shall review from time to time each agency administrative grievance system developed under this part to determine whether the administrative grievance system meets the requirements of this part. The Office shall require corrective action to bring a system which fails to meet the requirements into conformity. The Office does not act on a request by an employee to review the processing of, or the decision on, an individual grievance.

5 CFR 930.211 provides:

An agency shall not rate the performance of an administrative law judge.

Opposition

Office - Supreme Court, U.S.
FILED
DEC 16 1981
ALEXANDER L. STEVAS
CLERK

No. 81-830

In the Supreme Court of the United States

OCTOBER TERM, 1981

PETER MCCANN GIESEY, PETITIONER

v.

DONALD J. DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, AND MARVIN H. MORSE, DIRECTOR, OFFICE OF ADMINISTRATIVE LAW JUDGES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner, a GS-15 Administrative Law Judge, may maintain an action challenging the Office of Personnel Management's use of recommendations prepared by supervisory ALJs in connection with its determination of an ALJ's eligibility for promotion, when he has not exhausted the available procedure for administrative review of OPM's rejection of his own application for promotion and he is not otherwise aggrieved by the challenged practice.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-830

PETER MCCANN GIESEY, PETITIONER

v.

DONALD J. DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, AND MARVIN H. MORSE, DIRECTOR, OFFICE OF ADMINISTRATIVE LAW JUDGES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 7a-9a) and the memorandum opinion of the district court (Pet. App. 2a-5a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 7a-9a) was entered on June 5, 1981. A petition for rehearing was denied on August 4, 1981 (Pet. App. 10a). The petition for a writ of certiorari was filed on November 2, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Administrative Law Judges (ALJs) are " 'a special class of semi-independent subordinate hearing officers.' " *Ramspeck* v. *Federal Trial Examiners Conference*, 345

U.S. 128, 132 (1953) (citation omitted); see 5 U.S.C. (& Supp. IV) 554(d), 556(b)(3), 557. Although ALJs are employees of the agency from which they receive their appointment, see 5 U.S.C. (Supp. IV) 3105, the Office of Personnel Management (OPM) determines an individual's eligibility for appointment as an ALJ. See 5 U.S.C. (Supp. IV) 1104(a)(2). Once appointed, an ALJ may be removed from his position by the employing agency "only for good cause established and determined by the Merit Systems Protection Board." 5 U.S.C. (Supp. IV) 7521. Moreover, during his tenure, an ALJ is not subject to his employing agency's performance appraisal or rating system. 5 U.S.C. (Supp. IV) 4301(2)(D); 5 C.F.R. 930.211. OPM also determines the salary to be paid to ALJs under the Civil Service General Schedule, without regard to performance ratings by the employing agency. 5 U.S.C. (Supp. IV) 5372.

OPM determines an individual's eligibility for appointment to an ALJ position through a three-stage process. First, OPM's Office of Administrative Law Judges (OALJ) evaluates the applicant's legal experience based upon his written application; second, OALJ solicits evaluations of the applicant known as "vouchers" from persons with whom he or she has had professional contacts, using a standardized "Qualifications Inquiry Form"; finally, an applicant is required to prepare a sample opinion under examination conditions and is interviewed. An applicant for an ALJ position must receive a qualifying rating at each stage of the evaluation process in order to qualify for further consideration (J.A. 198).[1] Applicants adjudged eligible for an ALJ position are assigned a numerical rating and are ranked according to these ratings (J.A. 198-204).

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[1] "J.A." denotes the joint appendix that was filed in the court of appeals.

Administrative Law Judge positions are generally classified at grade 15 or 16 of the General Schedule (see J.A. 197). When a GS-15 ALJ applies to OPM for certification of his eligibility for appointment to a GS-16 ALJ position, OPM routinely seeks vouchers from the Chief ALJ and Assistant Chief ALJ of his employing agency and from the ALJ in charge of the particular office in which the applicant serves. Vouchers submitted by such "supervisory" ALJs ordinarily are given more weight by OALJ than other vouchers, but are not necessarily given conclusive effect (J.A. 201).[2] Ratings for GS-16 eligibles, like those for GS-15s, are also based upon the applicant's written application, his sample opinion, and interview performance. When an agency fills a vacancy for a GS-16 ALJ, it is ordinarily required to choose one of the top three ranking individuals from among those certified as eligible (J.A. 205).

2. Petitioner is a GS-15 ALJ employed by the Department of Labor. In November 1979 petitioner applied to OPM for certification of his eligibility for appointment to a GS-16 ALJ position (J.A. 180). While his application was in the second stage of the evaluation process, petitioner learned that his Chief ALJ was submitting a negative appraisal of petitioner's qualifications. In response, petitioner took three actions. First, petitioner filed a charge of retaliation with the Merit Systems Protection Board (MSPB) alleging that his Chief ALJ's unfavorable voucher was a reprisal for petitioner's complaints about various administrative policies adopted by the Chief ALJ. Petitioner asked that the Chief ALJ be directed not to submit any recommendation on petitioner's application (see J.A. 23-24).[3] Second, petitioner wrote to the Special Counsel

---

[2]As petitioner notes (Pet. 9 n.3), such vouchers are sometimes described as "controlling"; contrary to petitioner's statement (Pet. 7), however, such vouchers are not given conclusive effect (see J.A. 201).

[3]The record does not indicate what action, if any, the MSPB took on petitioner's charge of retaliation.

of the MSPB alleging that vouchering "supervisory" ALJs violated the statutory and regulatory exemption of ALJs from agency performance appraisals or ratings (see J.A. 25-26). The Special Counsel declined to take any action on petitioner's letter, finding that the facts it alleged did not show the existence of any prohibited personnel practice (J.A. 27). Finally, petitioner filed his complaint in this case.

Petitioner's complaint, filed on behalf of a putative class consisting of all GS-15 ALJs, asked the district court to enjoin OPM's solicitation and use of vouchers from "supervisory" ALJs on the ground that use of such vouchers constitutes impermissible application of performance ratings generated by the employing agency to an ALJ. Shortly after the filing of this action, petitioner's application for certification of eligibility for a GS-16 ALJ appointment was rejected. Petitioner took an appeal from that decision to OPM's ALJ Rating Appeals Panel. Respondents moved to dismiss petitioner's complaint without prejudice, citing his failure to exhaust administrative remedies as the ground for dismissal. The district court granted respondents' motion, pointing to petitioner's pending appeal before the Rating Appeals Panel and concluding that " 'it is readily apparent that the appeals panel may grant the relief requested or alter the issues to be presented to this Court" (Pet. App. 3a-4a).[4]

Rather than exhaust the administrative remedy to which the district court had referred, petitioner obtained a stay of his administrative proceedings and appealed the district court's order dismissing his complaint. The court of appeals agreed that a "full opportunity for administrative consideration of the issues tendered in this action" had not yet been

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[4]The district court accordingly did not rule upon petitioner's motion for class certification and did not reach the merits of petitioner's cross-motion for summary judgment.

afforded (Pet. App. 8a), and affirmed the order of dismissal. Petitioner thereupon dismissed his administrative appeal (see Pet. 10) and unsuccessfully petitioned for rehearing (Pet. App. 10a).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review of this unpublished decision is accordingly unwarranted.

1. Petitioner alleges (see Pet. 17-20, 32-40) that consideration of recommendations prepared by "supervisory" ALJs in connection with the determination of an ALJ's eligibility for promotion amounts to application of an employing agency's personnel performance appraisal system in contravention of 5 U.S.C. (Supp. IV) 4301(2)(D) and 5372. The courts below did not address this claim because they concluded that petitioner had failed to exhaust available administrative remedies (Pet. App. 3a-4a, 7a-8a). In support of his contention (Pet. 13-32) that he was erroneously required to exhaust administrative remedies, petitioner argues in this Court (*id.* at 14-17, 21-32) that no complete and efficacious remedy is open to him. He further asserts (*id.* at 20-21) that the gravamen of his complaint is an unlawful threat to his "decisional independence" (*id.* at 21, 24) in the performance of his duties as a GS-15 ALJ, and not, as he claims the courts below to have supposed, the rejection of his application for certification of eligibility for appointment as a GS-16 ALJ. Petitioner's contentions are unfounded.

a. Insofar as petitioner's complaint rests upon an alleged impediment to his own promotion, he has plainly failed to exhaust available administrative remedies. The weight, if any, to be accorded a recommendation solicited from a "supervisory" ALJ is open to determination by the OPM

ALJ Rating Appeals Panel. Had petitioner pursued his administrative appeal to fruition he might have persuaded the panel to give no weight to vouchers prepared by his "supervisory" ALJs, thereby obviating any alleged injury. Alternatively, the Rating Appeals Panel might have reversed OPM's decision and granted petitioner's application for certification of his eligibility for appointment to a GS-16 ALJ position. Accordingly, the district court correctly concluded (Pet. App. 4a) that petitioner's then-pending administrative appeal might secure him the relief he seeks, or at a minimum, "alter the issues to be presented" in this action.[5]

In *Ramspeck* v. *Federal Trial Examiners Conference, supra*, this Court rejected a challenge to a number of Civil Service Commission rules governing the promotion, compensation and tenure of ALJs (then called hearing examiners) in an action brought by a group of such examiners. In *Ramspeck* plaintiffs argued that the practices that they challenged allowed an agency to "control and coerce its examiners * * * [through] an absolute veto power over promotions." 345 U.S. at 138. The Court noted, however, that no actual examples of such coercion had been shown and that plaintiffs had not shown "that in such circumstances the [Civil Service] Commission would not correct the

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[5]Petitioner asserts (Pet. 26) that he would be injured by the use of vouchers prepared by "supervisory" ALJs even if such vouchers were disregarded in his own case, because he would still be obliged to compete against other applicants for GS-16 positions whose ratings had been "tainted" by use of such vouchers. However, no such injury could occur unless petitioner received a passing rating and were certified for employment as a GS-16 ALJ after the vouchers provided by "supervisory" ALJs had been excluded. Moreover, it is impossible to determine whether any such indirect prejudice could affect petitioner even if he received a passing rating until the rating appeal process is complete and petitioner's relative standing among GS-16 eligibles determined. (We note that passing ratings, as well as ratings too low to establish eligibility, are appealable by the applicant (J.A. 204)). Accordingly, the courts below correctly concluded that any claim of injury is at best premature.

situation." *Ibid.* Directing that the *Ramspeck* complaint be dismissed, this Court held that "[i]t must be assumed that the [Civil Service] Commission will prevent any devious practice by an agency which would abuse" the qualified independence of ALJs. *Id.* at 142.

Under the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, 5 U.S.C. (Supp. IV) 1101 *et seq.*, OPM and the MSPB have assumed all of the functions affecting ALJs that formerly were exercised by the Civil Service Commission. In determining the eligibility of individuals for ALJ appointments, the Director of OPM and his delegates—in this case the ALJ Rating Appeals Panel—are responsible for the "prevention of prohibited personnel practices, [and] for the compliance with and enforcement of applicable civil service laws, rules, and regulations." 5 U.S.C. (Supp. IV) 2302(c); see 5 U.S.C. (Supp. IV) 1104(a)(2). Accordingly, prevention of any "devious" agency practices that would infringe the qualified independence of ALJs is the responsibility of OPM in this case. Where, as here, petitioner had access to an administrative remedy through which he could obtain redress of his grievance concerning the uses of vouchers prepared by "supervisory" ALJs, the district court, consistent with *Ramspeck*, correctly required petitioner to exhaust that remedy.[6]

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[6]As in the court below, petitioner suggests (Pet. 4-5, 28-29) that, inasmuch as OPM vouchers "supervisory" ALJs as a "rule," his only administrative remedy was a complaint to the MSPB. He asserts that when the MSPB's Office of Special Counsel declined to take action on his letter of complaint, he had exhausted his administrative remedies through the MSPB. In response to this contention below, respondents observed that if petitioner challenges a rule, the Special Counsel's refusal to act on his complaint does not exhaust his administrative remedies, because petitioner need not rely on the Special Counsel to present his claim to the MSPB, but can do so himself. Compare 5 U.S.C. (Supp. IV) 1205(e)(1)(B) with 5 U.S.C. (Supp. IV) 1205(e)(1)(C). Contrary to any implication in the court of appeals' judgment (Pet. App. 8a), however, respondents have expressed no view

b. Insofar as petitioner's claim is unrelated to any impediment to his own promotion, he lacks standing to present the claim.[7] Petitioner insists (Pet. 9, 11, 21) that his claim is unrelated to his recent application for certification of eligibility for appointment as a GS-16 ALJ. However, in his complaint (J.A. 5-6, paras. 17-19), petitioner specifically alleged that he had applied for GS-16 certification and complained of the use of "supervisory" ALJs' vouchers in that process. The only personal injury alleged by petitioner (J.A. 6, para. 20) is that

> plaintiff and all others [*sic*] GS-15 ALJs who have applied for or have been placed on or have been denied

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on whether petitioner's claim may be deemed a challenge to a rule reviewable by the MSPB on an application by petitioner.

At oral argument, the court of appeals inquired whether other administrative remedies would remain available to petitioner should he remain dissatisfied after disposition of an appeal to the Rating Appeals Panel. In response, respondents' counsel suggested that petitioner might be able to invoke the administrative grievance system. See 5 C.F.R. Part 771. This would seem an appropriate administrative remedy to redress any threat of an unfavorable voucher to coerce or retaliate against him. See 5 C.F.R. 771.205. Since petitioner (and his "supervisory" ALJs) are employees of the Department of Labor, however, that agency's grievance system—and not OPM's—would be the appropriate forum in which to lodge such a claim.

In its unpublished judgment, the court of appeals merely noted (Pet. App. 8a) the possibility that additional administrative remedies might be available as additional grounds for affirmance. Accordingly, contrary to petitioner's contention (Pet. 16, 28-32), there is plainly no occasion in this case for review of the court of appeals' comments respecting additional administrative remedies.

[7]In the court of appeals (Appellant's Br. 14-20), as here (Pet. 20-21), petitioner argued that the district court had misunderstood the gravamen of his complaint. In response, respondents observed (Gov't Br. 12-14) that the only personal injury alleged by petitioner related to his own promotion prospects and that petitioner accordingly lacked standing to press any claim unrelated to his application for certification of eligibility as a GS-16. The court of appeals, which decided the case without discussing petitioner's theory (see Pet. App. 8a), evidently

> eligibility for the GS-16 Registers * * * have had, or will have, their eligibility and/or rating determined, at least in part, by a proscribed performance evaluation from their employing agencies.

Petitioner stresses (Pet. 24 & n.11) that he may again apply for certification as a GS-16. But in that event, he will once again have available to him the administrative remedy described above. Thus, even in its broadest terms, petitioner's claim of injury is inseparable from the context of an application for certification to the GS-16 register. Indeed, on petitioner's own theory of this case "a GS-15 ALJ is exempt from performance evaluation by the agency employing him only so long as he does not seek promotion" (Pet. 20). Accordingly, the injury alleged by petitioner arises only in connection with his interest in certification as a GS-16. Exhaustion of the rating appeals process accordingly was properly required.

Because petitioner is not aggrieved in any other respect, he cannot maintain an action to challenge OPM's certification practices except insofar as they relate to the prospect of his promotion. *Warth* v. *Seldin*, 422 U.S. 490, 502, 508 (1975); *Sierra Club* v. *Morton*, 405 U.S. 727 (1972).[8] Contrary to petitioner's suggestion (Pet. 22), the decision of the court of appeals does not conflict with *Nash* v. *Califano*, 613 F. 2d 10 (2d Cir. 1980). In *Nash*, an ALJ was held to have standing to assert a claim challenging various agency policies that "continuously infringed" (613 F. 2d at 14) on

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agreed. In any event, the court of appeals sub silentio disposition of petitioner's contention creates no precedent and a fortiori does not call for this Court's review.

[8]Petitioner claims (Pet. 21) that his standing arises from "jeopard[y]" to his decisional independence that allegedly results from vouchering by "supervisory" ALJs. However, petitioner has admitted that his decisional independence has never been chilled (see J.A. 153), and accordingly he lacks standing to press such a claim. See *Laird* v. *Tatum*, 408 U.S. 1, 13-14 n.7 (1972).

"every detail of [his] judicial role." *Id.* at 16. The practices challenged in *Nash* included pressures allegedly exerted by the employing agency intended to control the length, content and format of hearings conducted by and opinions written by an ALJ, as well as the ALJ's rate of production and the outcome of cases pending before him. *Id.* at 12-13. The ongoing injury to an ALJ threatened by such practices renders *Nash* readily distinguishable from this case.[9] Unlike the practice at issue here, the policies challenged in *Nash* had no relationship with promotion decisions and that case presented no question of exhaustion.[10]

2. Petitioner also contends (Pet. 32-40) that the court of appeals erred by refusing to enter summary judgment in his favor. But the court of appeals was not obliged to reach the merits, because the district court had not done so. By the same token, there is no occasion for this Court to consider the merits of petitioner's contention. See *United States* v. *Mitchell*, 445 U.S. 535, 546 n.7 (1980). In any event, petitioner's claim is based upon a serious misapprehension of the relationship between an ALJ and his employing agency.

Contrary to petitioner's suggestion, an agency is not proscribed from commenting on and evaluating an ALJ's performance when he seeks appointment at a higher GS level. Indeed, agency evaluation of an applicant for an ALJ position would seem to be inherent in the agency's freedom to choose which applicant to appoint from among those certified by OPM as eligible, see 5 C.F.R. 930.203(b), and it would clearly be inappropriate to forbid OPM from considering an agency's views when making decisions affecting

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[9] In *Nash*, the court also held that an ALJ lacked standing to challenge the administrative role played by supervisory ALJs, because he could show no concrete injury flowing therefrom. See 613 F. 2d at 17.

[10] Nash had also claimed that he had been improperly demoted from a supervisory position, but he abandoned that claim (613 F. 2d at 12).

the ALJs that will serve in the agency. See 5 U.S.C. (Supp. IV) 1305; *Ramspeck* v. *Federal Trial Examiners Conference, supra*, 345 U.S. at 142; 42 Op. Att'y Gen. 289, 295-296 (1964); 41 Op. Att'y Gen. 74, 78-79 (1951).

The statutory and regulatory exemption of ALJs from agency performance appraisal and rating systems (see 5 U.S.C. (Supp. IV) 4301(2)(D), 5372; 5 C.F.R. 930.211), upon which petitioner bases his claim, simply removes ALJs from the formal employee evaluation system that is used periodically to rate the performance of most other civil service employees. See 5 U.S.C. (Supp. IV) 4301 *et seq.*; 5 C.F.R. Parts 430 and 432. Agency performance appraisal systems form the basis for agency decisions respecting "training, rewarding, reassigning, promoting, reducing in grade, retaining and removing [those] employees" who, unlike ALJs, are not exempt from such systems. 5 U.S.C. (Supp. IV) 4302(a)(3). By contrast, ALJs and applicants for ALJ positions have their eligibility for appointment, and the General Schedule grade of any position that they are appointed to, determined by OPM—and following appointment are protected in their tenure by the MSPB. There is accordingly no basis for equating the recommendations solicited by OPM from "supervisory" ALJs in a position to be familiar with an applicant's qualifications with an agency performance appraisal system.[11] While misuse of the voucher system is not inconceivable, it is the duty of the OPM and the MSPB to prevent such practices. *Ramspeck* v. *Federal Trial Examiners Conference, supra*, 345 U.S. at 142. There has been no showing of an uncorrected abuse of the voucher system in this case.

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[11]Petitioner also misconceives a "supervisory" ALJ's status by characterizing such an individual's voucher as an agency rating. Although "supervisory" ALJs do perform certain necessary administrative duties, they remain ALJs, continue to hear and decide cases, and retain the same semi-independent status as all other ALJs. 42 Op. Att'y Gen. 289 (1964); Senate Comm. on Governmental Affairs, *Delay in the Regulatory Process*, S. Doc. No. 95-72, 95th Cong., 1st Sess. 110-112 (1977).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioner's Reply Brief

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No. 81-830

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

PETER McCANN GIESEY,

PETITIONER

v.

DONALD J. DEVINE, DIRECTOR,
OFFICE OF PERSONNEL
MANAGEMENT

AND

MARVIN H. MORSE, DIRECTOR,
OFFICE OF ADMINISTRATIVE
LAW JUDGES

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES
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PETER McCANN GIESEY,

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v.

DONALD J. DEVINE, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT

and

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OFFICE OF ADMINISTRATIVE LAW JUDGES

REPLY TO BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

A. INTRODUCTION

Respondents' contentions fail to withstand the scrutiny. With respect to the exhaustion question, they are based on distortions of the record and an attempt

to bury the fact most critical - namely that no administrative remedy is available that can provide relief for petitioner's complaint.1/

As to the merits, respondents in effect admit that they are seeking to accomplish indirectly prohibited agency evaluations of ALJs, stating that "an agency is not proscribed from commenting on and evaluating an ALJ's performance when he seeks appointment at a higher GS level" (Br. in Op. at 10). See Petition

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1/Respondents so misstate the record that we have requested that the portions of the record reproduced in the court of appeals as the Joint Appendix (herein cited "J.A.") be certified to this Court. Moreover, respondents imply that a resolution of the exhaustion question in petitioner's favor depends on acceptance of his position on the merits. That clearly is incorrect. While we believe, as stated in our Petition, and, infra, that petitioner's position on the merits is correct and is appropriate for consideration, that is not required to determine the exhaustion question favorably to petitioner.

at 19-20 and 38 n.18. Respondents' position strikes at the very heart of administrative due process. Below, we detail respondents' distortions of the record and their attempt to elevate form over substance. 2/

B. THE EXHAUSTION QUESTION

Respondents contend that petitioner failed to exhaust an administrative remedy capable of providing relief. To support that fallacious contention they mischaracterize petitioner's complaint

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2/ Respondents intimate that the court of appeals' election to issue an unpublished judgement is a reason for this Court to deny review (Br. in Op. at 5, 8 n. 6). We respectfully submit that court of appeals' election to dispose of a case summarily does not shield the judgement from review by this Court. Indeed, we suggest that the election of the court below in this case provides an additional reason for certiorari review. It indicates that part of the reason the court below erred is that it was mislead by respondents and did not comprehend either the nature or the importance of the issues presented. Surely, such an election by the court of appeals cannot operate to shield important issues from review by this Court.

and the record.

In their opposition at 8 - 9 respondents state:

> The only personal injury alleged by petitioner (J.A.6, para.20) is that
>
> > plaintiff and all others [sic] GS-15 ALJs who have applied for or have been placed on or have been denied eligibility for the GS-16 Registers * * * have had, or will have, their eligibility and/ or rating determined, at least in part, by a proscribed evaluation from their employing agencies.

Respondents grossly mischaracterize the complaint.3/

3/ The permanent relief prayed for in the class action complaint sought a declaratory judgement and an appropriate injunction. It did not seek any permanent relief with respect to petitioner's particular application for the GS-16 ALJ Register. Similarly, the temporary and preliminary relief requested did not ask relief personally for petitioner. All relief sought by petitioner (except a prayer for attorney's fees and costs) was applicable to him as an aggrieved class member. See J.A. 7-11.

Paragraph 13 of the complaint states, in pertinent part (J.A.5):

> By reason of the foregoing, GS-15 ALJs who contemplate applying for the GS-16 Registers have suffered, are suffering, and will suffer irreparable injury . . . in that said GS-15 ALJs are deprived of the independence mandated by statute and regulation. Said GS-15 ALJs must please the [supervisory] ALJ . . . to assure that they will receive a favorable reference or "voucher" when they apply for the GS-16 Registers.

Incredibly, respondents state that petitioner, who is a GS-15 ALJ, "is not aggrieved" (Br. in Op. at 9). They then state that "petitioner has admitted that his decisional independence has never been chilled (J.A. 153)" (Br. in Op. at 9 n.8) This is a distortion and misleading.

The testimony referenced by respondents is (J.A. 153):

> Q. When you learned of this process whereby the Chief, if we

may call them supervisory ALJ's, would receive vouchers to be filled out in the case of an incumbent 15 ALJ, did you in any way alter your approach in deciding cases?

A. I can answer categorically for myself, Mr. Levie. I did not. I later became very apprehensive about whether some of my colleagues might.

Q. So then you never -- I will rephrase that.

Upon learning of the existence of the vouchering process as it affected supervisory ALJ's and incumbent ALJ's, you never took any steps to add or delete anything from an opinion or decision you issued because of the impact that might have on receiving a favorable or unfavorable voucher from a supervisory ALJ, is that correct?

A. You are asking, Mr. Levie, whether I betrayed my oath to the court, whether I misbehaved professionally, and the answer is no.

Apart from the fact that respondents have mischaracterized this so-called "admission", petitioner's testimony immediately following, relevant to the

issue, is not mentioned. When asked on what facts the allegations of paragraph 13 of the complaint were based, petitioner responded, inter alia (J.A. 154-155):

> I do have knowledge of some circumstances which could probably be regarded as fact, if the Administrative Law . . . Judges involved were not so terrified [of] retribution, that they have refused to give me a statement or to testify to that effect.
>
> The nature of the crime seals the lips of all participants when it is successfully committed.

Petitioner further testified that when a group of GS-15 ALJs protested arguably unlawful case assignment policies in a written memorandum to the Chief ALJ at the Department of Labor, one of the GS-15 ALJs who had signed the memorandum was informed that "this sort of thing wouldn't do [him] any good" (J.A. 155), and that

"one of the most important vouchers that will be completed in the event of [his] application for the [GS-] 16 register will be filled out by the supervisory [Chief] ALJ" (J.A. 155-156). 4/

Respondents' statement (Br. in Op. at 9) that "even in its broadest terms, petitioner's claim of injury is inseparable from the context of an application to the GS-16 register" simply is wrong. As discussed in our Petition, the substance of petitioner's claim is that the existence of a practice whereby "supervisory" ALJs, who serve in that capacity at the pleasure of the agency, are in position to, at the least, substantially affect advancement within "the Administrative Law Judge career field" (J.A. 95), is an interference with

4/ Respondents concede that "misuse of the voucher ing system is not inconceivable" (Br. in Op. at 11).

ALJ decisional independence. The existence of that practice - a practice that infringes on the very essence of ALJ independence (see Nash v. Califano, 613 F.2d 10 (2nd Cir. 1980)) gives each GS-15 ALJ (including petitioner) standing and a sufficient interest to challenge the practice.

Whether or not petitioner at any time applied for the GS-16 ALJ Registers is irrelevant. Since a GS-15 ALJ's advancement necessarily requires a performance evaluation "voucher" from the supervisory ALJ, he effectively can be controlled by the agency, through the supervisory ALJ.[5/] As stated in our

5/ Respondents imply (Br. in Op. at 11 n. 11) that "supervisory" ALJs "retain the same semi-independant status as all other ALJs." That is true only with respect to their status as ALJs. It is not true with respect to their "supervisory" positions. In their "supervisory" positions, they serve at the pleasure of the employing agency. See J.A. 94, 97-98, 200 para. 27, and, infra. See also, Br. in Op. at 10 n.10.

Petition at 36-37, unlike other Federal employees, who freely can seek a position at a higher grade in an agency other than that in which they currently are employed, GS-15 ALJs must be certified to the GS-16 Registers to obtain a higher graded position in any agency.

Respondents have failed to point to any efficacious administrative remedy petitioner has failed to exhaust. While urging that the ALJRAP is an efficacious remedy (Br. in Op. at 7), they take no issue with our statement in the Petition at 25, that:

> Respondents do not dispute that the ALJRAP simply is a board that considers appeals of ratings on a case by case basis. It does not have authority to alter OPM and OALJ policies.

See J.A. 203-204 para. 34a. and b, and J.A. 88. 6/

In sum, there is no administrative remedy to deal with petitioner's complaint of interference with GS-15 ALJ decisional independence. The judgement below is plain error.7/

6/ Respondents' implication (Br. in Op. at 7) that the district court's dismissal of the complaint was consistent with the requirement in Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128 (1953), that administrative remedies be exhausted clearly is wrong. Ramspeck did not involve any exhaustion question. Moreover, as demonstrated, infra, respondents' reliance on Ramspeck to support their position on the merits is misplaced.

7/ Respondents also misstate their position in the court of appeals regarding the availability of other administrative remedies (Br. in Op. at 7-8 n.6) As stated in the Petition at 28-29, we suggested that this "vouchering" policy might be challenged as a "rule" within the meaning of the APA. Respondents contended that there was MSPB jurisdiction to review rules. They led the court of appeals to erroneously accept their position. After misleading the court below, respondents seek to down play the position they urged. Similarly, respondents apparently now concede that Government grievance (Cont.)

C. The Merits

As stated at the outset, respondents in effect concede that they are attempting to accomplish indirectly what is expressly prohibited by both statute and regulation - agency performance evaluations of ALJs for promotion purposes.[8/] Thus, respondents state that "petitioner's claim is based upon a serious misapprehension of the relationship between an ALJ and his

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7/(Cont.) procedures are not available to deal with petitioner's complaint regarding OPM policies.

Respondents note (Br. in Op. at 3 n.3) that the record does not indicate the disposition by the MSPB of petitioner's retaliation charge. The MSPB found itself unable to determine the merits of the charge, stating that it could not resolve credibility with respect to conflicting testimony. The disposition is irrelevant to this action.

8/ Respondents' reliance (Br. in Op. at 10) on United States v. Mitchell, 445 U.S. 535 (1980), is misplaced. Summary judgement at the appellate level is appropriate because the record is complete, and a plain violation of statute and regulation has been established. Furthermore, the issue presented is of compelling public importance. Cf. Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255, 1266 (4th Cir. 1974).

employing agency" (Br. in Op. at 10), and that (Br. in Op. at 10-11):

> Contrary to petitioner's suggestion, an agency is not proscribed from commenting on and evaluating an ALJ's performance when he seeks appointment at a higher GS level.
>
> * * *
>
> The statutory and regulatory exemption of ALJs from agency performance appraisal and rating systems . . . simply removes ALJs from the formal employee evaluation system that is used periodically to rate the performance of most other civil service employees.

Respondents' position does not accord with settled law (see Petition at 38 n. 18). The sum and substance of respondents' contention is that only if an ALJ is rated by his employing agency via the appraisal system utilized for other civil service employees is such evaluation proscribed. That is neither good law nor good sense, especially given the reasons agency evaluations of ALJs were

proscribed. See Petition at 32-34.

Ramspeck, supra, does not support respondents' position. So far as here relevant, Ramspeck's holding is only that it does not violate the APA for an agency to determine that it wishes to fill a higher graded vacancy from among its lower graded examiners (ALJs) so long as the Civil Service Commission (OPM) chooses which examiner is promoted. It does not, as respondents imply, permit an agency to rate ALJs for promotion purposes. Nor, does Ramspeck imply that practices which have been proscribed on the assumption that they are easily capable of corruption may be engaged in because OPM will prevent their devious use.[9/] On the contrary,

9/ As stated in the Petition at 37, the evaluation (J.A. 69-74) by the "supervisory" ALJ may include consideration of the applicant ALJ's decisions and the results reached in those decisions. See J.A. 199-200 paras. 23-26, and J.A. 115-120.

Ramspeck; Butz v. Economou, 438 U.S. 478 (1978); and Nash v. Califano, supra, indicate otherwise.

Carried to its logical conclusion, respondents' argument is that any agency rating practice for ALJs (done outside the normal civil service rating procedure) will pass muster on the assumption that OPM will prevent misuse. The statement of the argument is the argument's own refutation. See Petition at 38 n.18.10/

Similarly, as noted, supra, respondents' suggestion that ratings by "supervisory" ALJ's are from those with the same protected status (Br. in Op. at 11 n.11) does not withstand scrutiny. In

10/ That agencies may select ALJs from among the top three rated applicants does not license agencies to affect eligibility for promotion of its currently employed ALJs. The decision to employ or not to employ by a particular agency does not affect employability of an ALJ by a different agency. On the other hand, affecting eligibility for, or rating on, the Registers does have such effect.

their "supervisory" capacities, ALJs serve at the pleasure of the employing agency. They enjoy a different status. Potential loss of that status, at agency pleasure, means agency control.[11/] See Petition at 39 and J.A. 94, 97-98, 200 para. 27; Br. in Op. at 10 n.10. Thus, evaluations they provide effectively are from the agency.

D. CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition, a writ of certiorari should be granted.

11/ As stated in the Petition at 39, people may be controlled by potential loss of status, as well as by economic factors.

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